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IN THE SUPREME COURT OF THE UNITED STATES

NO. 77-823

OCTOBER TERM, 1977

PATRICIA ANNE SHEPLER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF OREN D. SHEPLER, DECEASED,
PLAINTIFF-RESPONDENT,

v.

WEYERHAEUSER COMPANY, A WASHINGTON CORPORATION,
DEFENDANT-APPELLANT-PETITIONER,

and

PACIFIC COAST SHIPPING COMPANY, LIBERIA,
DEFENDANT-RESPONDENT.

PETITIONER'S REPLY BRIEF

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SUMMARY OF ARGUMENT

The Oregon Supreme Court misconstrued the duty owed by a charterer or shipowner and rendered a decision in direct conflict with most Federal cases, particularly the recent apposite case of Westcott v. Impresas

Armadores, S.A. Panama, 564 F2d 875 (9th Cir. 1977). Contrary to plaintiff's assertion, Weyerhaeuser took no active role in the loading; instead, it relied upon the expertise of the stevedore.

Weyerhaeuser properly raised the question of the application of the equitable credit doctrine in the state trial court by an initial pleading (struck on plaintiff's motion) and by unchallenged request for submission of the case to the jury on special verdict by interrogatories.

REPLY TO RESPONDENT'S STATEMENT OF REASON WHY WRIT SHOULD NOT BE GRANTED

1. The Oregon Supreme Court Misconstrued The Shipowner's Standard of Care and Applied a Rule in Direct Conflict With Most Federal Decisions.

Plaintiff asserts erroneously:

> "There is no conflict among the Circuit Courts of Appeal with respect to a tortfeasor's liability for the kind of negligent conduct involved in this case. All of the federal decisions which have construed the 1972 amendments to the LHWCA are in agreement that a shipowner's active participation in loading or unloading a vessel subjects him to liability for injury attributable to his own negligent acts or omissions. ..." (Resp. Br. pp. 3-4).

Contrary to plaintiff's contentions, Weyerhaeuser took no active role in loading the M/S PACKING, and the decision of the Oregon Supreme Court on this issue of substantial and recurring federal importance conflicts with a number of well-reasoned Federal cases including Wescott v. Impresas Armadores, S.A. Panama, 564 F2d 875 (9th Cir. 1977) (hereinafter referred to as "Wescott"), a recent Federal case arising in Oregon.

Wescott, supra, involved injuries sustained by a longshoreman (employed by an independent stevedore) during the loading of two kinds of wheat. The stevedore

superintendent suggested a sloping separation whereby the first type of wheat is poured into the hatch, runs to a natural angle of repose, and is covered by a burlap material before the second load descends. The ship's master objected and requested a flat separation which required leveling the first type of wheat before placement of the burlap and loading of the second type of wheat. The master did not instruct the stevedore how to achieve the leveling. The stevedore, in its expertise, chose to employ a "panning" method, using a heavy curved metal pan controlled by taglines to level the cargo. Plaintiff, an experienced longshoreman, suffered injuries occasioned by the panning method; he contended that the ship (by reason of its construction) lacked appropriate fixtures for attachment of the taglines, and this defect caused him harm. At no time did the stevedore

or longshoremen ever advise the shipowner that a flat separation might cause harm to men in the hold. The Ninth Circuit, shortly after the decision was rendered in the case presently before this Court, held that the shipowner was entitled to a directed verdict under these facts and reversed the district court judgment for the longshoreman.

Wescott, supra, presents facts squarely apposite to the present case and points up the conflict engendered by the Oregon Supreme Court decision.

Mr. Shepler sustained injuries during the loading process while employed by an independent expert stevedore (Ex. 44; Tr. pp. 488-489, 500). The charterer requested a tight stow (Ex. 13; Tr. pp. 75-78, 490) and declined to authorize bull winches; no one told Weyerhaeuser that failure to use bull winches would result in a safety haz-

ard (Tr. pp. 140, 160, 198, 341, 440, 527, 529). In fact, the stevedore could have employed bull winches if, in its expertise, it determined their use appropriate and necessary (Tr. p. 504). The expert longshoremen (including Mr. Shepler, Tr. p. 225) decided to "dead end" the logs (Tr. pp. 267, 327) without any request or direction from the charterer; Weyerhaeuser never advised the longshoremen how to load the logs in the hatch (Tr. pp. 288, 480, 486). By reason of the method chosen by the longshoremen, and the obvious configuration of the hatch (Resp. Br. p. 6), the crevasse developed adjacent to the aft bulkhead (Tr. pp. 154, 173).

Plaintiff mistakenly argues that the two Weyerhaeuser employees near the job - the superintendent and the union supercargo - ". . . exercised actual control over the selection of logs and method of

loading . ... " (Resp. Br. p. 5). To the contrary, their presence does not constitute direction, control or active participation in the loading, any more than the nature of the cargo (length of log drafts) caused a loss which should be visited upon Weyerhaeuser. Weyerhaeuser employs a union member, Mr. Pitzer, as supercargo to oversee its interests in loading (Tr. pp. 178, 485-486). Mr. Pitzer acts in a record-keeping capacity and orders logs from the log yard in accordance with the specifications of the Japanese buyers (Tr. pp. 136, 291-292, 467, 475, 485-486). He advises the stevedore walking boss of the nature of the cargo and the appropriate hatch, leaving it to the walking boss and hatch boss how to load the cargo (Tr. p. 344). Mr. Pitzer neither serves as a safety engineer (Tr. p. 447) nor tells the longshoremen

how to load the logs (Tr. p 344, 480, 486). He did not direct Mr. Shepler to climb down the stow (Tr. p 200). He acts as the first line of union employee, carries out Weyerhaeuser instructions that cargo be loaded, and works with Weyerhaeuser personnel in preplanning the stow (Tr. pp 485-486, 502).

Mr. Wilson's duty amounts to acting as loading superintendent (Tr. p 434): he receives purchase orders and, with the assistance of the supercargo, assigns the logs to the appropriate vessel (Tr. pp 434, 485-486). He did not advise or direct the stevedore gang boss how to load the logs, but left that function to the stevedore (Tr. pp 288, 480, 486). He merely relayed his superior's directions to the ship and stevedore to fill all available space with cargo (Tr. p. 3320. The stevedore chose the method to achieve

a tight stow; Weyerhaeuser is entitled to assume an expert will pick a safe means of performance, even if it knows of the manner of performance. Wescott, supra.

2. Weyerhaeuser Properly Raised The Question of the Equitable Credit Doctrine in The State Trial Court.

Weyerhaeuser does not concede that it failed to raise the issue of equitable credit below (Resp. Br.p 10). The issue of the stevedore's responsibility was raised by Weyerhaeuser's initial pleading and by the submission of a special interrogatory form of verdict.

Weyerhaeuser raised this issue when it affirmatively pleaded the following defense at the outset:

> "THIS ANSWERING DEFENDANT FOR A SECOND AFFIRMATIVE ANSWER AND DEFENSE ALLEGES:
>
> "I
>
> "Incorporates herein as though fully stated herein this answering defendant's first affirmative answer and defense.

"II

"That OREN LEE SHEPLER was an employee of Portland Stevedoring Company on or about the 21st of December, 1972, and his employer was in control and charge of the loading of the vessel and was in control and charge of OREN LEE SHEPLER and that if SHEPLER died as the result of the negligence of anyone, it was the negligence of his employer, Portland Stevedoring Company." (Trial court file.)

Plaintiff moved against defendant's answer and the Circuit Court struck the language as subject to proof under a general denial (trial court file). Plaintiff should not be heard to assert "waiver" in these circumstances, where she precluded the defense in the pleading stage.

On trial, defense counsel requested submission of the special verdict by interrogatory form to the jury and advised the trial judge of the necessity for such a verdict in order to eliminate the need for a new trial to determine the

application of the equitable credit doctrine. The record does not indicate any objection to the special verdict by plaintiff, nor does plaintiff advise the court of any additional procedural means necessary to preserve the issue for appeal.

CONCLUSION

Because this petition raises two undecided federal questions -- the shipowner's duty under the 1972 Amendments, and the appropriateness of the equitable credit doctrine -- this court should grant this petition and hear the case on the merits.

Respectfully submitted,

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